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# Supreme Court of the United States

OCTOBER TERM, 1947.

## No. 520.

WABASH RAILROAD COMPANY, PETITIONER,

VS.

OCIE HAMPTON, ADMINISTRATRIX OF THE ESTATE OF JOHN LEO HAMPTON, DECEASED.

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

### STATEMENT OF THE CASE.

This action was brought under the Federal Employers' Liability Act to recover for the death of respondent's husband, foreman of an extra gang who was killed when Petitioner's fast eastbound passenger train No. 2 struck and killed ten of the extra gang on a curve in a cut known as "Dead Man's Cut," approximately sixty three miles west of St. Louis, Missouri. The train crew concededly violated

long standing rule and custom requiring the engine to sound warning whistles in going into and through cuts in curves for the protection of men working on the track (Tr. 239). From a verdict for respondent in the trial court in the sum of Forty Thousand Dollars ($40,000), Petitioner prosecuted an appeal to the Supreme Court of Missouri. The judgment was there affirmed and became final. Petitioner now seeks to have this court review the opinion of the Supreme Court of Missouri.

## Theory of Parties in Trial Court.

Plaintiff tried and submitted the case on the admitted failure of train No. 2 to sound warning whistles going into and around the curve in the cut for the protection of men working on the track, in violation of rule and long standing practice and custom (Tr. 222-223).

Petitioner's theory was that deceased had been given an oral instruction not to operate an air compressor activating air hammers unless he had a watchman on the bank above the cut, and that he did not have a watchman posted at the time of the casualty, and that such failure constituted the sole cause of the casualty, even though the train crew were conceded to have failed to sound warning signals as required by rule and custom for protection of such workmen, and such rule was relied upon by such workmen.

## Issues Raised in Missouri Supreme Court.

Petitioner asserted as grounds of reversal in the Missouri Supreme Court the following:

1. The evidence was insufficient to show that the sounding of warning whistles would have been effective to warn deceased and avert the casualty.

2. Deceased's violation of the alleged verbal order not to operate the compressors without a watchman on the bank was the sole proximate cause of his death (violation of primary duty).

3. Deceased's claimed violation of the alleged order requiring a watchman constituted contributory negligence as a matter of law and the court erred in not so instructing the jury (Inst. 7, Tr. 226-227).

4. Respondent's given Instruction No. 3 on contributory negligence and plaintiff's explanatory instruction on sole cause conflicted with defendant's Instruction No. 9 on sole cause and were confusing and misleading (Tr. 224-225, 228-230).

## Opinion of Missouri Supreme Court.

In overruling the contentions raised by petitioner, the Missouri Supreme Court made the following holdings:

1. "Viewing the evidence in its light most favorable to plaintiff, we find that there was substantial evidence to show that a whistle could have been heard by the men working at the hammers, had the whistle been sounded" (Tr. 239).

2. "There was substantial evidence showing defendant was negligent in failing to warn and that such negligence was the proximate cause in whole or in part of her husband's death" (Tr. 239).

3. "In the instant case, assuming the deceased was instructed not to operate the compressor unless he had a watchman on the bank, we do not believe his violation of such instruction was in and of itself the sole and only cause of the casualty. * * * It appears to us that the giving of this instruction to deceased did not thereby relieve the defendant of its duty to warn by whistle as prescribed by its

rules and by custom and practice, a duty which it owed whether a watchman was stationed on top of the bank or not" (Tr. 242-243).

4. "Its (trial court) refusal to instruct the jury that decedent was guilty of negligence as a matter of law was also proper" (Tr. 243).

5. "The instructions do not conflict, they distinguish the issues, and are not confusing" (Tr. 244).

## ISSUES ON CERTIORARI.

As reasons relied on for the issuance of a Writ of Certiorari by this Court, Petitioner makes substantially the same claims made in the Missouri Supreme Court.

## STATEMENT OF FACTS.

Respondent believes that the facts in this case clearly demonstrate the correctness of the rulings of the Missouri Court. Although respondent deems petitioner's statement to be confusing, incomplete in some respects, and as tending to treat as undisputed matters brought out only in oral testimony on defense, she refers this court to the statement of the case made in the opinion of the Missouri Supreme Court and adopts that statement (Tr. 237 *et seq.*).

## SUMMARY OF THE ARGUMENT.

I.

**In holding that there was substantial evidence that a whistle would have been effective to prevent the casualty if one had been sounded as required by rule and custom, and that such failure to warn was a proximate cause of the casualty, the holding of the Supreme Court of Missouri is in harmony with controlling federal decisions.**

*Tennant* v. *Peoria and Pekin Union Ry. Co.*, 321 U. S. 29, 88 Law Ed. 520.

*Lavender* v. *Kurn*, 327 U. S. 645, 90 Law Ed. 916.

*Ellis* v. *Union Pac. R. Co.*, ..... U. S. ....., 91 Law Ed. 433.

*Preston* v. *Union Pac. R. Co.*, 292 Mo. 442, 239 S. W. 1080, Cert. Den. 260 U. S. 753, 43 Sup. Ct. 14.

*Kidd* v. *Chicago, R. I. & P. Ry. Co.*, 310 Mo. 1, 274 S. W. 1079, Cert. Den. 269 U. S. 582, 46 Sup. Ct. 119.

II.

**The Supreme Court of Missouri correctly held that petitioner's evidence that deceased had been given a verbal order to have a watchman on the bank, which order he had allegedly violated, did not defeat a recovery in spite of evidence that petitioner's violation of rule and custom to warn would have been effective to avoid the casualty, because:**

**(a) The jury was not required to accept as true petitioner's verbal testimony (incapable of direct contradiction) that deceased was ordered not to operate the hammers without a watchman on the bank, and this court is not bound by such testimony.**

*Sartor* v. *Arkansas Natural Gas Co.*, 321 U. S. 620, 88 Law Ed. 967.

*C. & O. Ry. Co.* v. *Martin*, 283 U. S. 209, 51 Sup. Ct. 453.

**(b) Such violation of the alleged order, if true, could only constitute assumption of risk, which has been abolished as a defense.**

*Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 Law Ed. 610.

**(c) Evidence supported finding that failure to warn was a direct proximate cause of death.**

*Spokane & I. E. R. Co.* v. *Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, l. c. 688-689.

*Rocco* v. *Lehigh Valley R. R.*, 288 U. S. 275, 53 Sup. Ct. 343.

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*Brock* v. *Mobile & O. R. Co.*, 330 Mo. 918, 51 S. W. 2d 100, Cert. Den. 287 U. S. 638, 53 Sup. Ct. 87.

III.

**The Missouri Supreme Court properly sustained the trial court in refusing to give petitioner's instruction No. 7 because it was not supported by the evidence, was abstract, took jury issues from the jury, failed to explain the effect of contributory negligence and ignored proximate cause.**

Authorities under Point II above.

IV.

**Respondent's instructions three and twelve were correct legally and involve no substantial federal question.**

*Seaboard Airline Ry. Co.* v. *Duvall*, 225 U. S. 477, 32 Sup. Ct. 790.

## ARGUMENT.

The opinion of the Supreme Court of Missouri so clearly sets out the facts in this case and so accurately applies the law to these facts that any argument in support of the correctness of this opinion hardly seems necessary. If anything else were needed to demonstrate the correctness of that opinion, we believe it would only be necessary to cite one case, that of *Brock* v. *M. & O. R. Co.*, 330 Mo. 918, 51 S. W. 2d 100, where the facts are almost identical with those in the present case. This court placed the stamp of approval on that opinion by denying a writ of certiorari, 287 U. S. 638, 53 Sup. Ct. 87. However, for such additional argument as this Court may desire to consider, we set out the following:

### POINT I.

**In holding that there was substantial evidence to show that a whistle could have been heard by the men working at the hammers had the whistle been sounded and that the failure to whistle was a proximate cause of Hampton's death, the Supreme Court of Missouri is in harmony with controlling federal decisions.**

In holding that the plaintiff sustained the burden of proof necessary for recovery under the Federal Employers' Liability Act, the Supreme Court of Missouri found from the record that, "there was substantial evidence showing defendant was negligent in failing to warn" (Tr. 239). Petitioner does not claim that there was insufficient evidence of a rule and of long established custom and practice of sounding the whistle when entering and all the way around curves in cuts for the protection of men working

there. Neither does petitioner contend that there was insufficient evidence of a violation of such rule and custom. Petitioner could hardly so contend in view of the positive testimony of both petitioner and respondent that such rule and custom existed and were violated.

Petitioner contends, however, that there was no substantial evidence in this case that the sounding of a whistle when going into and around this curve would have prevented this accident. The Supreme Court of Missouri, after reviewing the record, said, "We find there was substantial evidence to show that a whistle could have been heard by the men working at the hammers, had the whistle been sounded" (Tr. 239). Petitioner has cited no controlling Federal decisions with which this holding of the Missouri Supreme Court conflicts.

In so contending, petitioner ignored and now ignores the proof and the positive testimony of its own witness, Ray McLaughlin, who had been in charge of track maintenance and maintenance employees for petitioner in the district between St. Louis and Columbia, Missouri, since 1924. He was thoroughly familiar with track work and had been around men operating air hammers many times in the course of his duties for the defendant (Tr. 176-178). We quote McLaughlin's testimony on this point:

"Q. Now, of course, you have been around gangs working when they operated air hammers, have you not?

A. Yes, sir.

Q. And it is usually possible to hear the train whistles over and above the hammers?

A. Yes, sir, I have heard that whistle.

Q. Well, can you usually hear trains whistle over and above the noise of the air hammers?

A. Yes, I would say that you could.

Q. When the train was how close?

A. Approximately a mile.

Q. What?

A. Part of a mile away.

Q. In other words, if eight air hammers had been operating and a train whistled a quarter of a mile away, it has been your experience that the men operating the hammers could hear that whistle?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. And train No. 2 was required to whistle approaching and entering this curve, was it not?

A. Yes, sir.

Q. Then, why was it necessary to have a watchman out if the men could hear the whistle?

A. *To give that much more protection"* (Italics ours) (Tr. 200-201).

In view of McLaughlin's positive testimony that a whistle was the principal means of protection and could have been heard, and in view of his position and experience with petitioner, we submit that his evidence on this point is conclusive.

Leo Hampton, who had worked for the Wabash on the extra gang, and as section foreman for forty-three years, testified that based on his experience men working with air hammers in cuts on curves like the one in question could hear warning whistles when the hammers were running, and that men *relied on hearing the whistle* (Tr. 70-71, 80).

**It was not necessary for deceased or the men using the hammers to have heard the whistle in order to have prevented the catastrophe.**

After George Hampton had uncoupled the pipe and talked to deceased he was relieved of all duties but looking

and listening for trains. He went west along the middle of the track for the express purpose of looking and listening for a train whistle. He testified that after he got west of the hammers and at or near the compressor he could have heard a train whistle a mile, or a mile and a half away (Tr. 27, 32). Had he heard such a whistle, he could have immediately turned off a valve on the south side of the compressor and stopped the hammers and called the men's attention to the train (Tr. 28). The hammers made a chattering noise which did not carry a long distance like a train whistle (Tr. 31). On previous occasions he had always heard trains when they whistled while the hammers were operating (Tr. 48-49). The noise created by tamping rock under the ties does not spread out a long distance, while the sound of a whistle carries for a great distance (Tr. 80).

Under this evidence, the question was one of fact for the jury and it is not the function of the Appellate Court to reweigh the evidence.

*Tennant* v. *Peoria and Pekin Union Ry. Co.*, 321 U. S. 29, l. c. 34, 36, 88 Law Ed. 520, l. c. 524-525.

*Lavender* v. *Kurn*, 327 U. S. 645, l. c. 652-653, 90 Law Ed. 916, l. c. 922-23.

*Ellis* v. *U. P. R. Co.*, 91 Law Ed. 433.

*Preston* v. *U. P. R. Co.*, 292 Mo. 442, 239 S. W. 1080, l. c. 1082, Certiorari Denied 260 U. S. 753, 43 Sup. Ct. 14, 67 Law Ed. 496.

*Kidd* v. *Chicago, R. I. & P. Ry. Co.*, 310 Mo. 1, 274 S. W. 1079, Certiorari Denied 269 U. S. 582, 46 Sup. Ct. 119, 70 Law Ed. 424.

## POINT II.

**The opinion of the Supreme Court of Missouri is not in conflict with controlling decisions of this court in holding that the alleged violation of verbal order did not defeat respondent's right of recovery.**

**(a) The jury was not required to accept as true relator's testimony that such an order was given and the reviewing court cannot accept it as true.**

We direct the attention of the Court to the fact that the alleged order given Hampton not to operate the compressor unless he had a watchman on the bank was a verbal order. The only evidence as to this alleged order *came from petitioner's testimony.* The jury was not bound by this testimony, and, in passing upon the sufficiency of the evidence, this testimony must be ignored by the reviewing Court.

In *Sartor* v. *Arkansas Natural Gas Co.*, 321 U. S. 620, l. c. 627-628, 88 Law Ed. 967, l. c. 973, this Court said:

> "The rule has been stated 'that if the court admits the testimony, then it is for the jury to decide whether any and if any, what weight is to be given to the testimony.' *Spring Co.* v. *Edgar*, 99 U. S. 645, 658, 25 L. Ed. 487, 490. 'The jury, even if such testimony be uncontradicted, may exercise their independent judgment.' *The Conqueror*, 166 U. S. 110, 131, 41 L. Ed. 937, 946, 17 S. Ct. 510. 'The mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact.' *Sonnentheil* v. *Christian Moerlein Brewing Co.*, 172 U. S. 401, 408, 43 L. Ed. 492, 495, 19 S. Ct. 233."

The only exception to this rule is set out in *Chesapeake & O. Ry. Co.* v. *Martin*, 283 U. S. 209, 51 Sup. Ct. 453, cited by petitioner, where no question of the credibility of

the witness was raised, he was not impeached or contradicted, his testimony was positive and direct, and, if not true, was easily capable of contradiction. This exception does not apply in the present case and the credibility of witnesses McLaughlin and Lee was for the jury.

Any other rule would work a grave injustice in a case like the present one where defendant relies on a verbal order claimed to have been *given to a man now deceased and unable to deny that such an order was given and in the exact terms claimed.* Defendant's evidence did not show that there were any witnesses to the alleged conversation other than Lee, who would be in a position to know whether the order was actually given or accurately stated in the testimony. It was impossible of contradiction by direct testimony by any living witness.

The weight of testimony of petitioner's witnesses McLaughlin and Lee was for the jury, and cannot be said to be unimpeached, or beyond doubt or question. We point out the following inconsistencies:

(1) The testimony is undisputed that John Hampton was an experienced, reliable and trusted employee of the railroad and if a positive order had been given in the terms claimed which fixed his duty, it is not reasonable to believe that he would have failed to obey it.

(2) Petitioner proved by its Superintendent McLaughlin that he considered a watchman only an additional means of protection (Tr. 248, 250). This tends to disprove or cast doubt on the alleged claim that he gave the direct and positive order he testified to.

(3) McLaughlin was present in court when the plaintiff's case was closed, yet defendant did not place him on the witness stand but read his deposition (Tr. 176-177). It must be inferred that defendant preferred reading his

deposition to putting him on the witness stand so that the jury might see him personally and pass upon his credibility and so that he could be cross-examined in the court room.

(4) His testimony as to the orders he gave Hampton was contradictory. We find the following:

"Q. Well, was Hampton instructed to have any certain kind of signals?

A. He was instructed to have a watchman out at all times while the machine was in operation and as to what signal or setup he used, his duty was to make that arrangement himself.

Q. In other words, Hampton was not instructed as to how to protect the men other than he was told to have a watchman at all times.

A. Yes, sir.

Q. Did you give these instructions yourself?

A. Yes, sir.

Q. Were they verbal instructions or written?

A. Yes, sir, verbal" (Tr. 275).

However, he later testified as follows:

"Q. Now, did Hampton at any time receive any instructions other than what you have already stated he received?

A. Well, he received instructions what work to do at this location, how much he was to raise the track.

Q. I mean with reference to protecting the men against trains.

A. The instructions which Mr. Hampton were given was to protect the track where he was working with a slow order for all except first-class trains, and to have the track in safe condition for first-class trains, and not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles" (Tr. 195-196).

The testimony of McLaughlin is so contradictory as to make the weight of his testimony and his credibility an issue for the jury. At one time he positively testified that Hampton's only instructions were to have a watchman at all times, while he later testified that he was instructed not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles. Also a watchman was only an additional means of protection and Hampton had to work out his own way of getting warning from such watchman. The credibility of the testimony as to Hampton's duty in regard to the watchman is further impeached by his further testimony as follows:

> "Q. Now, as I understand it, Mr. McLaughlin, it was not Hampton's duty to look out for trains, was it? A. It was his *sole duty to handle the track* so it would be safe for the passage of trains, first-class trains, at full speed and it wasn't necessary to have it for the second-class trains, because they had an order to reduce to 25 miles an hour" (Tr. 202).

It is obvious that if it were true, as McLaughlin here states, that it was Hampton's *sole duty* to make the track safe for first-class trains, then he had no duty as to the men's safety.

(5) Further, McLaughlin and Lee both claim that McLaughlin told deceased to have a watchman *on the bank when the compressor was running*, yet both knew that George Hampton was the man appointed to watch, and *both knew that he was the compressor man and couldn't be on the bank and starting and stopping the compressor at the same time* (Tr. 188-189, 193, 198, 199, 216, 217).

Neither testified to McLaughlin protesting the choice of a watchman who *could not possibly* carry out the order they claim was given. This is irrefutable evidence that such an order was never given, or not in the terms they

claim because the watchman, in whose appointment McLaughlin acquiesced, could not be two places at once. To start or to stop the compressor, he had to be by or at the compressor.

(6) McLaughlin was track supervisor for the Wabash, the scene of the accident was in his territory. Hampton was under his supervision and the ten men who were killed were in his department, and he was responsible for their safety. His self-interest cannot be overlooked since he was so closely connected with the occurrence. There was also evidence that Lee was next in charge after McLaughlin and his self-interest was also greater than that of an ordinary employee.

**(b) Violation of primary duty constitutes assumption of risk and is no defense.**

Assuming (as did the Missouri Court) that the order was given and violated, such conduct on decedent's part would constitute assumption of risk. In *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, l. c. 63, 87 L. Ed. 610, l. c. 615, this Court held that in the application of the "primary duty rule" contributory negligence "*becomes assumption of risk*" (Italics ours) which was abolished as a defense by the Amendment of 1939. Respondent could only be denied recovery if the evidence failed to show any negligence except that of deceased which proximately caused or contributed to cause the collision. The case does not involve the application of the "primary duty rule" but the rule of proximate cause.

**(c) The evidence supported the finding that petitioner's failure to warn was a direct proximate cause of Hampton's death.**

Notwithstanding the fact that the Missouri court found, "There was substantial evidence showing that defendant was negligent in failing to warn and that such

negligence was the proximate cause in whole or in part of her husband's death," Petitioner claims that the alleged violation of the alleged verbal order should defeat recovery.

Even if it could be assumed that plaintiff is bound by petitioner's evidence as to the verbal instruction claimed to have been given Hampton in regard to a watchman, this could not defeat or impair respondent's right to recovery. Petitioner admittedly had a duty to warn the men of the approach of the train by sounding warning whistles going into and around the curve. This duty is admittedly violated. The evidence was clearly sufficient for the jury to find that men relied on the whistle, could hear the whistle and that the whistle would have avoided the casualty. George Hampton was 250 feet west of the hammer and where he could hear the whistle for a mile (Tr. 27, 32). The duty of the train to warn by whistle was an independent duty owed by petitioner, regardless of whether a watchman was on top of the bank or down in the cut by the compressor. Petitioner's testimony clearly brought out that *warning whistles were the primary method of protecting men working on curves in the cuts,* especially this cut under the existing conditions. Defendant's witness McGlothlin positively testified as follows:

> "Q. Then, why was it necessary to have a watchman out if the men could hear the whistle?
> A. *To give that much more protection*" (Tr. 201).

Under the undisputed testimony the primary mandatory duty of protecting the men rested on the enginemen under written rules and long established custom, and their failure was a proximate cause of the casualty as ruled by the Missouri Supreme Court.

If the "primary duty rule" has any application in the present case, it applies to the enginemen and not to the

deceased. The primary means of protecting the men was the engine whistle, and a watchman was merely additional protection. Therefore, the primary duty of protecting the men working on the tracks rested on the engineer, and he violated this duty when he failed to obey the positive rule and custom, and his conduct in so doing should be held to be the sole proximate cause of the injury under the "primary duty rule."

The Supreme Court of Missouri points out that, "The mere placing of a watchman on the bank would not insure the safety of the men at work on the track. The watchman must first discover the approaching train in time to warn the men, then transmit the warning in time for them to reach a place of safety" (Tr. 242-243).

The testimony showed that when a man was up on the bank south of the tracks looking for trains he was 250 feet west of the men and on the bank south of the compressor and had no way of warning the men that there was an approaching train other than by waving, and if that did not attract their attention while they were working with hammers he would run down the bank to shut off the air and stop the hammers (Tr. 165, 166, 191, 192, 207). George Hampton, on several occasions, had started to and was running down the bank to shut off the air when they saw him. It had been necessary for him to start running down the bank to shut the air off that morning (Tr. 30-31). He was about twenty-five feet from the compressor before the men noticed him and got off the track for a freight train with a twenty-five mile slow order (Tr. 31, 50, 51, 165-166).

The Supreme Court of Missouri has so capably analyzed and distinguished the authorities cited by petitioner that we will not reanalyze them here (Tr. 240-244). It is sufficient to point out that in *Great Northern R. Co.* v. *Wiles*, 240 U. S. 444, 36 Sup. Ct. 406; *Davis* v. *Kennedy*,

266 U. S. 147, 45 Sup. Ct. 33; *Unadilla Valley Ry.* v. *Caldine*, 278 U. S. 139, 49 Sup. Ct. 91; *Southern R. Co.* v. *Youngblood*, 286 U. S. 313, 52 Sup. Ct. 518; *Unadilla Valley Ry. Co.* v. *Dibble*, 31 F. 2d 239, and *Frese* v. *Chicago, R. I. & P. R. Co.*, 236 U. S. 1, 44 Sup. Ct. 1, a collision between two trains was involved. In none was there any negligence on the part of the employees operating the train with which the collision took place. In each of the above cases the negligence charged was the failure of another employee on plaintiff's train to prevent the injured or deceased employee from violating a positive order. In each case, the court held that it was not negligence to fail to prevent a man from doing what he was forbidden to do and which he had positive orders to do. The situation in the present case would only be analogous if respondent sought to recover from the railroad for the failure of a subordinate to remind deceased to place a watchman on the bank.

Under all of the evidence in this case, if there was no watchman on the bank, the failure to see that George Hampton was not on the bank but down at the compressor could constitute nothing more than contributory negligence or assumption of risk, neither of which would defeat recovery, since such failure could be nothing more than a concurring proximate cause. *Spokane & I. E. R. Co.* v. *Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, l. c. 688-689; *Rocco* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 53 Sup. Ct. 343; *McCarthy* v. *Penna. R. Co.*, (C. C. A. 7) 156 Fed. 2d 877; *Brock* v. *Mobile & O. R. Co.*, 330 Mo. 918, 51 S. W. 2d 100, Cert. Den. 287 U. S. 638, 53 Sup. Ct. 87.

The Rocco case cited above has been thoroughly discussed in the opinion of the Missouri Supreme Court (Tr. 243). In that opinion, this Court clearly distinguished the situation in the cases cited by petitioner from a situation like that in the present case. Had a rule forbade Rocco from starting on an inspection trip when a train was within

seven or eight miles of Ithaca, the engineer of the train which struck him would have been guilty of no negligence because such a rule would have excused him from anticipating that Rocco might be on the track and taking steps to protect him.

In the present case, the duty to warn was absolute, and the primary means of protection, whether or not a watchman was or was not on the bank, particularly in view of the evidence that such a watchman might be ineffective to warn the men. So say the witnesses. In the Brock case, the situation was almost identical to that in the present case. Brock violated a rule prohibiting him from proceeding with a hand car unless a flagman was sent out when the view of the track was obstructed. He was killed when a train, in violating a custom to sound warning signals, struck the hand car. The Missouri Court held that Brock's negligence in failing to comply with the rule did not constitute sole cause, as his failure to send a flagman indicated he was relying on the custom of trains to sound warning signals. This court did not find such holding in conflict with controlling decisions as it denied a petition for writ of certiorari.

## POINT III.

**The court properly sustained the trial court in refusing to give petitioner's instruction No. Seven** (Tr. 227) **because it did not follow the evidence, was abstract, took jury issues away from the jury, failed to explain the effect of contributory negligence and ignored the question of proximate cause.**

Relator's requested Instruction 7 was as follows:

"The Court instructs the jury that at the time and place mentioned in evidence, it was the duty of John Leo Hampton, the deceased, not to operate the compressor unless he had a watchman on the embankment

> where he could see the approach of trains in time to warn deceased, and that in failing to so station a watchman, the deceased was guilty of negligence as a matter of law.
>
> "You are further instructed that if you find from the evidence that said negligence of deceased in so failing to station a watchman on the embankment was the sole cause of his death, then your verdict must be for defendant" (Tr. 227).

It will be noted that this is not a contributory negligence instruction, but it submits to the jury whether the declared negligence could or could not be sole cause.

Petitioner, in contending that this instruction should have been given, cites a number of petitioner's printed rules. These rules are immaterial here because the instruction did not purport to invoke them.

There are numerous reasons why the Court did not act in excess of its discretionary powers in refusing this instruction. We call attention to the following:

(1) It does not follow the evidence. Petitioner apparently attempted to base this instruction upon the testimony of witness McLaughlin as to the oral instruction allegedly given deceased, but failed to adhere to such testimony.

It places upon decedent the absolute duty not to operate the compressor unless he had a watchman on the embankment *"where he could see the approach of trains in time to warn deceased * * *."* This does not conform to the instruction McLaughlin claims to have been given, "not to operate the compressor unless he had a watchman on the bank where he could see approximately two miles." Instead of placing upon decedent the duty McLaughlin claims was placed on him by his order, this instruction absolutely requires him to have a watchman who could see the approach of trains, "in time to warn deceased."

No one claims that deceased was given such an order, and under the evidence it would have been impossible to carry out such an order because it was conjectural as to whether a watchman on the bank could get down the bank and to the men, or to the compressor, in time to warn them. Deceased was not specifically instructed as to how the watchman would operate to prevent the train striking the men. In this respect, the testimony is as follows;

> "Q. In other words, Hampton was not instructed as to how to protect the men other than he was told to have a watchman at all times?
>
> A. Yes, sir.
>
> Q. But you did not instruct Hampton as to what kind of a signal he would receive from the watchman or what kind of a signal the watchman would tell him that a train was coming?
>
> A. No, sir, that was Hampton's duty to work that out for himself" (Tr. 192-193).

The instruction therefore did not follow the evidence and placed a greater duty on Hampton than McLaughlin claims he placed upon him, and placed an absolute legal duty upon him to have a watchman who could see trains "in time to warn deceased." It made the element "in time to warn" negligence as a matter of law when such element was not in the alleged verbal order. It will likewise be noted that the instruction does not require him to be warned in time to escape injury. A failure to have a watchman could hardly constitute negligence or a proximate cause of Hampton's death if the watchman's only duty was to warn him of trains, even though the warning came too late to avert catastrophe.

The instruction assumes that a watchman on the bank could have seen a train in time to warn deceased, which was an issue for the jury and could not be declared as a matter of law.

(2) The instruction requires the jury to take as true the testimony of McLaughlin. We have heretofore pointed out that McLaughlin's credibility was an issue for the jury. This instruction would have withdrawn that issue from the jury.

(3) Decedent's failure, if any, would have constituted assumption of risk and not negligence.

We have heretofore pointed out that under the authority of *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 Law Ed. 610, a violation of the primary duty rule becomes assumption of risk and not contributory negligence.

(4) The instruction fails to explain the effect of decedent's negligence. The instruction declared that the deceased was guilty of negligence, yet failed to tell the jury what the effect of such negligence would be if they did not find that such negligence was the sole cause of Hampton's death as submitted in paragraph two of the instruction.

(5) The instruction required no finding of proximate cause. The instruction told the jury that decedent was guilty of negligence as a matter of law and that such negligence would completely defeat recovery if it constituted the sole cause of his death. It failed to explain that such negligence to constitute contributory rather than sole negligence must enter into and form a part of the efficient cause of the casualty. Had this instruction been given, it, taken in connection with plaintiff's Instruction 3, would have authorized the jury to diminish the verdict, even though such negligence did not in any wise contribute to Hampton's death.

## POINT IV.

**The Missouri Supreme Court properly held that it was not error to give respondent's instruction Number Three** (Tr. 224) **and Number Twelve** (Tr. 230) **and no substantial federal question is involved herein.**

Respondent's Instruction No. 3 was in conventional form, and told the jury that if they found the plaintiff guilty of contributory negligence it would not bar recovery, but that the damages affixed must be diminished in proportion to the amount of negligence attributable to the plaintiff. Relator makes no claim that this instruction incorrectly states the law under the Federal Employers' Liability Act. Respondent's Instruction 12 explained that decedent's conduct as submitted in Instruction 9 could not constitute the sole cause of his death as submitted in that instruction, if they found that the railroad was negligent as submitted in Instruction 1, and such negligence directly concurred and combined in causing the death of John Hampton. This correctly stated the law and did not involve substantial rights under the Federal Employers' Liability Act. The assignment raises no substantial Federal issue. *Seaboard Airline Ry. Co.* v. *Duvall*, 225 U. S. 477, 32 Sup. Ct. 790, l. c. 793.

Wherefore, respondent respectfully submits that the decision of the Missouri Supreme Court is in conformity with controlling decisions of this Court under the Federal Employers' Liability Act, and that the petition should be summarily denied.

Respectfully submitted,

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